Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1997

JOHN E. HARPER,

Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY and MISSOURI PACIFIC RAILROAD COMPANY,

Respondents.

On Petition for Writ of Certiori to the Supreme Court of the State of Missouri

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Railway Labor Act preempt a state trial court from controlling discovery and abusive tactics used by a railroad defending a claim brought by its employee pursuant to the Federal Employers Liability Act (FELA) for damages sustained as a result of on-duty injuries.

2. Does a State Trial Judge have the power to enforce 45 U.S.C. § 55 to prevent an FELA Defendant from using the provisions of the collective bargaining agreement as part of a concerted plan to exempt itself from liability?

PARTIES TO THE PROCEEDING

The parties to the proceeding below were the State of Missouri through the Union Pacific Railroad Company and the Honorable Robert H. Dierker, Jr., Circuit Judge for the City of St. Louis, State of Missouri. In addition, John E. Harper is the plaintiff in the underlying lawsuit brought pursuant to the FELA against the Union Pacific Railroad Company and Missouri Pacific Railroad Company. The Missouri Pacific Railroad Company and Union Pacific Railroad Company have merged and the corporation is now known as the Union Pacific Railroad Company.

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Petitioner, John E. Harper, respectfully requests that a writ of certiorari be issued to review the Opinion of the Supreme Court of Missouri in this case.

OPINIONS BELOW

Memorandum and Order of the Honorable Robert H. Dierker, Jr., presiding judge of the Twenty-Second Judicial Circuit for the City of St. Louis, State of Missouri dated March 17, 1997 in the case of *John E. Harper v. Missouri Pacific Railroad Company, et al.* with cause number 962-07038 (App. C). The Order of the Missouri Court of Appeals, Eastern District in the *State of Missouri Ex Rel. Union Pacific Railroad Company and Missouri Pacific Railroad, Relators v. Honorable Robert H. Dierker, Jr., Respondent*, No. 725-83 denying Relator's Petition for Writ of Prohibition dated May 28, 1997 (App. B). The Opinion of the Supreme Court of Missouri in *State Ex Rel. Union Pacific Railroad Company and Missouri Pacific Railroad, Relators v. Honorable Robert H. Dierker, Jr., Judge, Circuit Court, St. Louis City, Respondent*, No. 80014, 961 S.W.2d 816 (Mo. banc 1998) (App. A). The Order of the Missouri Supreme Court and *State Ex Rel. Union Pacific Railroad Company and Missouri Pacific Railroad Company v. Honorable Robert H. Dierker, Judge, Circuit Court, St. Louis City*, No. 80014 denying Respondent's Motion for Rehearing dated February 24, 1998 (App. D).

STATEMENT OF JURISDICTION

The Petitioner, the Honorable Robert H. Dierker, Jr., Circuit Judge for the City of St. Louis, entered his Memorandum and Order of May 17, 1997 prohibiting Relators from holding an investigation or otherwise disciplining their employee who has an FELA claim pending against Realtors in that court. John E. Harper

is an employee of Relators with an FELA claim pending in the Circuit Court of the City of St. Louis, with a caption of *John E. Harper v. Missouri Pacific Railroad Company, et al., supra.* Following the entry of Petitioner's Memorandum and Order, Relators filed their Petition for Writ of Prohibition in the Missouri Court of Appeals, Eastern District which denied said Petition by Order dated May 28, 1997. Relators then filed a Petition for Writ of Prohibition in the Supreme Court of Missouri. The Supreme Court of Missouri had jurisdiction over the matter pursuant to its power to issue original remedial writs granted by Article V, Section 4, Clause 1 of the Constitution of Missouri. The Supreme Court of Missouri filed its Opinion on January 27, 1998 holding that Respondent was preempted from prohibiting Relators from disciplining their employees who were making FELA claims for on-duty injuries pending before Respondent. The Supreme Court of Missouri also held that there was no violation of 45 U.S.C. § 55 by Relators in their disciplining of employees with FELA claims pending in front of Petitioner, including John E. Harper.

This Court has jurisdiction to review this state court Judgment under 28 U.S.C. § 1257(a) because a Final Judgment or Decree was entered in the highest court of the State of Missouri in which a decision could be had and this action involves a federally created cause of action under a federal statute, the Federal Employers Liability Act, 45 U.S.C. §§ 51-60. Petitioner has exhausted all appellate remedies in the State of Missouri. This court has previously issued a Writ of Certiorari and reviewed a decision of the Missouri Court of Appeals when the Supreme Court of Missouri has refused to grant the Petitioner's Application for Transfer. *St. Louis Southwestern Railway Company v. Dickerson*, 470 U.S. 409 (1995).

STATUTE INVOLVED

This case arises under the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60 (1996). Pursuant to Supreme Court Rule 14, Petitioner has attached the pertinent text of the FELA in the Appendix at Appendix E.

STATEMENT OF THE CASE

A number of employees of the Missouri Pacific Railroad Company and the Union Pacific Railroad Company (the merged railroad is hereinafter referred to as Union Pacific) filed claims in the Circuit Court of the City of St. Louis for on-duty injuries suffered during their employment with the Union Pacific pursuant to the Federal Employees Liability Act (hereinafter FELA). John E. Harper was one of the employees who filed such a lawsuit alleging that he was injured on April 17, 1996. As part of its defense of these FELA lawsuits, the Union Pacific began ordering their injured employees with on-duty injuries to submit medical documentation to the railroad, attend return-to-work physical examinations, attend functional capacity evaluations and other similar orders or face discipline. Discipline results from an investigation held by the railroad where testimony of the injured employee is taken under oath concerning his accident without the benefit of his attorney being allowed. The instruction of the railroad to its injured employee to provide such information and attend such exams and evaluations is done *ex parte* despite the fact that the injured employee is often represented by counsel. Mr. Harper and other injured employees with FELA claims pending against the railroad petitioned the court to enter a Protective Order prohibiting the railroad from engaging in such extrajudicial discovery and further requesting that they be protected from discipline, such as termination of employment or other disciplinary measures which were being used by the railroad to avoid liability created by the FELA.

Mr. Harper and other employees of the railroad with suits pending in the Circuit Court of the City of St. Louis filed a number of Motions for Protective Order requesting relief from the actions of the railroad. The injured employees also believed that the plan developed by the railroad was used for the purpose of avoiding FELA liability by terminating employment of the injured employee which would then allow the railroad to seek to avoid liability for future lost wages by claiming that the employee had been terminated for unrelated violations of the Collective Bargaining Agreement (hereinafter CBA). Many of the injured employees who were instructed by the railroad to attend functional capacity evaluations and/or return-to-work physical exams had been found to be occupationally disabled from performing their jobs with the railroad, and also advised by their treating physicians that they would be unable to return to work for the railroad due to the serious injuries sustained. Mr. Harper is one of these disabled employees.

The Railroad does not dispute that it has initiated *ex parte* communications with employees who are represented by counsel. The Railroad also does not dispute that it has failed to comply with the rules of civil procedure regarding discovery. Further, the Railroad concedes that its process of demanding information relating to an employee's legal claim for personal injury damages in an extra-judicial setting is not expressly authorized by the terms of the CBA governing the relationship between itself and its employees.

In essence, the Railroad attempts to justify its practice of engaging in *ex parte*, extra-judicial, discovery practices by virtue of the employer/employee relationship which it claims exempts it from the substantive protections afforded an employee by the FELA and discovery rules. Alternatively, the Railroad suggests that if these protections apply to it, any dispute arising from implementation of its practices is preempted from judicial

resolution and relegated to the narrow grievance procedures set forth in the RLA. The Railroad has suggested that it engages in these practices for legitimate business reasons. However, the facts show otherwise.

To understand why Judge Dierker and his predecessor, Judge James R. Dowd, entered their protective orders, the true purpose for the Railroad's *ex parte* contact must be examined. The process of securing extra-judicial discovery was developed, and is managed, by the Railroad's in-house Legal and Claims Departments. Its primary purpose is to allow the Railroad to minimize a plaintiff's recovery in his or her FELA suit. The Railroad has stated that: "The reduction of back injury payout is a major goal of the Law Department's Claims and Litigation Management Division." Accordingly, "[The Railroad has] implement[ed] bold measures to reduce the Company's financial exposure . . ." These "Guidelines were implemented in September, 1986, to insure the prompt investigation, aggressive medical management, accurate evaluation, and direct handling of all back injury cases."

To meet this stated goal, in the words of the Railroad, a claims agent should properly manage a case which "enables the Claims representative to maintain better control, and influences the eventual outcome." In managing the case

> It is extremely important that Claims personnel work closely with the General Solicitors [in-house railroad *attorneys*] and their staff to develop and implement an aggressive plan of investigation in each back injury case.

This will, *inter alia*, "ensure the strongest possible defense in the event that a case goes into litigation." Further, the Railroad's Handbook specifically provides:

> The Claims Representative can better understand the complex mix of tangible and intangible factors involved in each case when greater control is maintained over the process . . . [The cases] can be more objectively evaluated *because of the additional knowledge and enhanced ability to influence and minimize damages that result from increased control.*
>
> The Claims Representative has an opportunity, through effective medical management and rehabilitation efforts, to significantly increase his/her control of the entire Claims process. Even if the case is not settled directly and the injured employee hires an attorney, the knowledge gained during this process will, however, almost always be very helpful in preparing litigated cases for the best possible defense.

Deborah Marr, Manager Medical Programs for the Railroad, has admitted that the Claims agents for the Railroad are to "be responsible for coordinating medical and, if necessary, vocational rehab from the time of the on-duty injury through the return to work and/or the claims lawsuit resolution." (Exhibit 19(27), p. 22). Contrary to the implication that the Railroad's practices in litigation are somehow necessary to further its employer-employee relationship, these practices are *not* used in off-duty injury cases.

In order to control and manage FELA claims, the Railroad has adopted a policy by which it seeks to extract medical information from injured employees through requests for records, medical exams, functional capacity exams and requirements that employees return to work despite advice from their doctors to the contrary, all outside the Missouri rules of discovery and the inherent rule of all litigation providing for communication through a party's attorney. These requests are mailed to injured employees

through letter which purport to be from their supervisor. However, these letters are drafted by the Railroad's attorneys. These letters are, in fact, sent at the request of in-house *attorneys* (General Solicitors) or of a Railroad claims agent. Thus, the letters have nothing to do with the employment relationship but are instead devices which use the employer's managers as agents of the attorneys to extract information and to place the Railroad in a favorable litigation posture.

The Manager Mechanical Maintenance in the Railroad's shop testified at an investigation of a carman who did not respond to a letter of the ilk at issue in this case. When asked who at the Railroad instructed him to send the letter, he stated,

> It comes out of the Legal Department. Once a month I have a meeting with the Claims and the Legal Department. We discuss each injury that's hanging out there, whether they have a lawyer or not . . .

The Manager had never sent a similar letter to anyone off work due to an off-the-job injury. Furthermore, when asked what the company claims department or lawyers had to do with the letter he stated,

> They [company lawyers] tell us if we haven't had contact with the person, if they haven't contacted us within a certain time, to set them up for a physical in order to find out what their, or if their physical capability has changed any.

One of the Railroad's Managers, Les Mood, admitted that "all of the employees in question being required to take the examinations are allegedly disabled due to on-the-job personal injuries." Likewise, a Union Pacific Superintendent admitted that medical examinations and FCE's were only scheduled for

employees with work-related injuries (and thus legal claims). These requests for medical information are not administered to other employees who have no claims if they are being kept off work by their doctors. The Railroad requests medical information from employees through the letters drafted by its attorneys, even though it has the means for obtaining it through court-mandated medical records releases.

The process the Railroad uses to gain an advantage in FELA cases is as follows: First the Railroad will send a letter requesting medical records directly to the employee, ostensibly from a supervisor, bypassing the employee's attorney. If the employee does not comply, he is charged with insubordination and a disciplinary hearing will be held at which time the employee is not entitled to the presence of legal counsel and where the company acts as both judge and the jury. The employee is then subject to dismissal for insubordination, after which the Railroad argues at trial that he has no wage loss.

Alternatively, the Railroad will send a letter directly to the employee, again bypassing the attorney, stating either that the employee must report to work or must attend a medical examination and/or functional capacity evaluation ("FCE") to be conducted by a physician selected by the Railroad. These directives are made completely outside the Missouri rules prescribed for independent medical examinations in litigation. Again, if the employee refuses, the employee is subject to termination for insubordination. If the employee is disciplined short of dismissal, then the whole process is started over again until the employee complies with the Railroad's demand and returns to work against his own treating doctor's advice or refuses to comply and is fired. In either event, the Railroad's strategy is to eliminate any claim of wage loss by substituting an entire mechanism of *ex parte* communications and medical examinations and to completely eliminate attorney representation, in lieu of the

Missouri discovery and attorney-client rules and despite the employee's rights under 45 U.S.C. § 55.

After firing the employee through this extra-judicial process, the Railroad then files a motion *in limine* at or before trial to prevent any claim of future wage loss. This is based on the theory that since the employee is fired, he would not be able to earn wages in the future from the Railroad whether he had an injury or not. Motion in Limine re future wage loss claim filed in *Diale v. Union Pacific Railroad Company*, Cause No. 852-01836 (Twenty-Second Circuit, State of Mo. 1989).

Plaintiff John Harper is employed by the Railroad as a carman. On or about April 17, 1996, while working for the Defendant, Plaintiff sustained serious and debilitating lower back injuries in the process of replacing a windshield in one of the Defendant's locomotives. Plaintiff filed an action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, ("FELA"), against the Defendants Missouri Pacific Railroad Company and Union Pacific Railroad Company (hereinafter "Railroad") in the Circuit Court for the City of St. Louis on June 7, 1996.

On June 1, 1996, Plaintiff received a notice of an "investigation" [1] set for June 4, 1996, regarding Plaintiff's alleged failure to provide the Railroad with information outside Missouri discovery rules regarding his current medical status. Plaintiff's attorney filed a Motion for Protective Order and for Sanctions on July 22, 1996. Thus, the motion was heard by Judge Dierker on February 26, 1997. Judge Dierker issued an Order indicating that:

> Defendant is prohibited from communicating with Plaintiff except through Plaintiff's counsel, pending

1. The Railroad uses the term "investigation" to mean a disciplinary hearing at which the employee is charged with acts which can result in imposition of discipline.

> further order. Defendant is prohibited from instituting any investigation or taking any action regarding Plaintiff's employment status, pending further order. Defendant is prohibited from ordering Plaintiff to appear for any examination, pending further order.

Judge Dierker also allowed the parties to submit additional briefs on the matter and Plaintiff submitted three items: (1) the February, 1997, letter sent directly to Plaintiff, rather than to his attorney, from a representative of the Railroad instructing Plaintiff to again provide additional medical information, outside Missouri rules of discovery; (2) the reply letter from Plaintiff to the Railroad, indicating the prognosis of his injury and including a copy of his treating doctor's report; and (3) the Railroad's subsequent response, again directed to Plaintiff rather than his attorney, instructing him to send further medical documentation of Plaintiff's condition, outside Missouri discovery rules. Judge Dierker subsequently issued his Order of March 17, 1997, which is the subject of the present action. (App. C)

Plaintiff kept the Railroad informed of his current medical status and prognosis, both within the FELA litigation and directly with the Railroad's representatives. In addition, immediately after the accident, Plaintiff informed the Railroad of his injury. Plaintiff completed several "Medical Treatment Verification" Forms for the Railroad, which indicated the extent of his injury and any medications prescribed to the Plaintiff. Plaintiff then subsequently provided the Railroad with two completed forms entitled "Fitness for Duty" reports, indicating that Plaintiff's physician imposed physical restrictions on his work through May 10, 1996.

Upon Plaintiff's return to work with his permanent physical restrictions, the Railroad sought to have him perform job duties outside those restrictions. On or about May 13, 1996, Plaintiff sought further medical care and treatment from Dr. Schoedinger,

a physician in St. Louis, who indicated that Plaintiff was unable to work at that time and that his return to work date was indefinite. Plaintiff presented this report to a representative of the Railroad, Mr. Andrew Ribbing, who indicated that the Railroad wanted other information that, according to Mr. Ribbing, the Plaintiff needed to provide to the Railroad.

Plaintiff was diagnosed with a ruptured lumbar disc at L4-5 and Dr. Schoedinger performed major surgery — a lumbar diskectomy — on Plaintiff on October 11, 1996. Although he is still an employee of the Railroad, Plaintiff has not worked there since May, 1996, and Dr. Schoedinger has advised Plaintiff not to return to work as a carman because of the heavy manual labor involved in that occupation.

Further, within the context of the FELA action, and pursuant to the Local Rules of the Circuit Court for the City of St. Louis, Plaintiff provided the Railroad's attorneys with signed medical authorizations allowing them access to Plaintiff's medical records. The attorneys for the Railroad also took plaintiff's treating doctor's deposition on September 9, 1997.

Judge Dierker entered his protective order against the Railroad in the *Stewart v. Union Pacific Railroad Company et al.*, Cause No. 962-07894 (Twenty-Second Circuit, State of Mo. 1997), and *Harper*, cases, *supra*, on March 17, 1997. (App. C). This order was entered after the court considered and took judicial notice of the above-mentioned similar orders entered by prior Chief Judge Dowd in 1996. The court also considered the extensive record that was filed in support of motions filed in front of himself and Judge Dowd. The court found:

> Almost invariably, the FELA plaintiffs remain on the employment rolls of the Railroad, at least until any claim of total disability is resolved. As a result, the Railroad seems to be determined to extract advantage from the continuing employment relationship. This

> advantage is sought in two ways: by demanding medical information or submission to medical or vocational evaluation by the plaintiff, and by instituting disciplinary proceedings when the information or examination is not forthcoming.

The court went on to take judicial note of Judge Dowd's findings, stating:

> This Court has already found that the Railroad Defendants are not proceeding in good faith in taking the sort of actions here at issue. There is abundant evidence to suggest that only employees with pending FELA claims encounter demands to report for "back to work" physicals and the like. The court will not second-guess previous findings. There can be little question that the Railroad would not be initiating these requests, examinations or disciplinary proceedings if it saw no advantage to it.

In light of his findings, Judge Dierker entered his Order prohibiting the Railroad from continuing its extra-judicial discovery and further from disciplining Plaintiffs or altering their employment status, unless it was for affirmative misconduct, during the pendency of the FELA case. In the interest of uniformity and judicial economy, the court, after reviewing the extensive record of the Railroad's bad faith conduct, further held that upon a request by a plaintiff and after a hearing, a similar Order would be issued unless the Railroad could show affirmative misconduct or fraud by the plaintiff.

The Railroad's use of the Collective Bargaining Agreement to avoid liability, or to avoid paying full compensation to an injured FELA claimant, violates 45 U.S.C. § 55. Further, its developed plan described above is a device used to defend FELA claims

and, thus, violates 45 U.S.C. § 55. Further, the railroad claims that its use of the Collective Bargaining Agreement preempts a trial court from controlling the actions of parties litigating claims before it. Specifically, the railroad contends that the Railway Labor Act preempts the trial court from issuing the type of protective order issued by Judge Dierker in the *Harper* case, *supra* and by Judge Dowd in a number of other similar cases.

REASONS FOR GRANTING THE WRIT

I.

THE RAILWAY LABOR ACT, 45 U.S.C. § 151, DOES NOT PREEMPT THE PROTECTIONS GRANTED TO FELA LITIGANTS CONTAINED WITHIN THE FEDERAL EMPLOYERS' LIABILITY ACT, 45 U.S.C. §§ 51-60, BECAUSE SUCH PROTECTION EXISTS INDEPENDENT OF THE COLLECTIVE BARGAINING AGREEMENT, NOR DOES THE RLA PREEMPT A STATE COURT'S INHERENT POWER TO CONTROL THE CONDUCT OF THE PARTIES BEFORE IT.

A. The Railway Labor Act Does Not Preempt the Federal Employers' Liability Act.

The Federal Employers' Liability Act ("FELA") is a broad, remedial statute which is the exclusive remedy for a railroad worker who is injured on the job and must be liberally construed to accomplish its humanitarian purposes. *Urie v. Thompson*, 337 U.S. 163, 180 (1949). The FELA provides individual railroad workers with rights and minimum substantive guarantees, independent of the employer's obligations under the collective bargaining agreement (CBA), to protect them against a railroad's negligent conduct. *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 565 (1987). In contrast, the Railway Labor

Act ("RLA") provides a comprehensive framework for the resolution of labor disputes in the railroad industry. *Id.* Despite the strong policy encouraging arbitration under the RLA,

> different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.

Id. at 567. Since the FELA is such a statute, the RLA does not preempt any portion of the FELA and has no effect on an injured employee's claim against the railroad, even when the claim involves conduct that may be subject to arbitration under the RLA. *Buell*, 480 U.S. at 564, 566-67. In fact, the National Railroad Arbitration Board (NRAB) lacks jurisdiction to enforce rights created by the FELA; its authority is limited to questions arising out of interpretation and application of Railway Labor agreements. *Hawaiian Airlines v. Norris*, 512 U.S. 246, 255 (1994). FELA plaintiffs are thus entitled to protection of all substantive rights provided by the statute. 45 U.S.C. § 51 *et seq.*

Accordingly, no claims under the substantive protections of the FELA can be thrown out on the grounds that it is a minor dispute under the RLA. *Hammond v. Terminal Railroad Association of St. Louis*, 848 F.2d 95 (7th Cir. 1988). The FELA must be liberally construed and

> not only provides railroad workers with substantive protection against negligent conduct that is independent of the employer's obligations under its CBA, but also affords injured workers a remedy suited to their needs unlike the limited relief that seems to be available through the Adjustment Board.

Buell 480 U.S. at 565. Present Plaintiff is entitled to a forum in which to recover all of his damages caused by the Railroad's negligent conduct.

However, in the case at bar, the Missouri Supreme Court incorrectly ruled:

> this case is subject to the RLA's mandatory arbitration provision and within the exclusive jurisdiction of the arbitration board of the RLA. Resolution of this dispute depends upon interpretation of the meaning of the collective bargaining agreement. This is because it is necessary to interpret the implied terms . . . of the [CBA's] as exhibited by the company medical rules and the railroad's regular practices to determine whether the railroad has a right to issue such directives . . . or plaintiffs have a right to be free from them.

The Missouri Supreme Court incorrectly applied the preemption analysis above because the RLA preempts no portion of the FELA. The trial court correctly determine that the enforcement of the plaintiff's rights under the FELA was not preempted by the RLA because "the court unquestionably does have jurisdiction to enter orders in the context of FELA actions which will protect the Court's jurisdiction to hear and decide such actions fairly" (App. C).

The power of the state trial courts is certainly not derived from the CBA. *See Hendley v. Central of Georgia Railroad Co.*, 609 F.2d 1146 (5th Cir. 1980). Only where the claim is "firmly rooted in a breach of the CBA itself" and the CBA is the "only source" of the right sought to be protected does the RLA preempt the action. *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972). The holding by the Missouri Supreme Court that the actions taken by the trial court involve a "minor dispute" and are preempted under the RLA, is flawed in that it fails to recognize the trial court's order involved no interpretation or reference to the CBA. Furthermore, the Plaintiff never requested an interpretation of or reference to the CBA as the source of the

Court's ability to fashion an appropriate remedy, but rather simply asked the trial court to assert its power to regulate the conduct of the parties that appear before it to protect Plaintiff's substantive rights under the FELA. Whatever the source of a trial court's power to regulate the conduct of litigants, such power exists independent of the terms of the collective bargaining agreement between the Plaintiff's union and Railroad and the employee's FELA litigation rights are, therefore, not preempted. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 258-60 (1994). Other federal courts have recognized the power to control discovery and the conduct of parties before the court in FELA cases involving a railroad's same bad faith conduct. *Smith v. Union Pacific Railroad Co.*, 878 F. Supp. 171, 172 (D. Colo. 1995) (court entered protective order to prohibit railroad's actions until divested of jurisdiction upon completion of the case); *Vicary v. Consolidated Rail Corp.*, 942 F. Supp. 1146, 1149 (N.D. Ohio 1996).

B. The Railway Labor Act Does Not Preempt 45 U.S.C. § 55 or a State Trial Court's Power to Enforce Said Law.

One provision contained within the FELA is 45 U.S.C. § 55 which provides that:

> Any contract, rule, regulation, or device whatsoever, the purpose of which shall be to enable any common carrier to exempt itself from any liability under this chapter, shall to that extent be void . . .

The Court should grant the Writ because the ruling by the Missouri Supreme Court that actions taken by a trial court that preserve and protect an FELA Plaintiff's ability to recover the entire amount of their damages are preempted by the RLA conflicts with this Court's opinion in *Norris* and has a long-reaching impact important for all railroad workers in the United States. The trial court in the underlying action made detailed findings of fact

regarding the carefully conceived plan of the Railroad to deprive injured workers from recovering the full amount of their damages by systematically using the provisions of the collective bargaining agreement to impose demands for medical information, physical examinations and other similar requirements outside the context of the litigation and subsequently terminating the Plaintiff for failing to appear for such *ex parte* examinations. Indeed, the trial court found that:

> The record presented to this Court indicates the railroads here are not seeking these examinations and imposing discipline in good faith. It appears to this Court that the conduct engaged in by the railroads is rather designed to chill the plaintiffs rights under the FELA.

Here, the plan by the Railroad to fire Plaintiff to cut off his future wage loss claims was exposed and demonstrated to the trial court. Under Section 55 of the FELA, the plan is a "device" to enable the carrier to exempt itself from liability for future lost wage loss claims and, as such, is void. By necessary implication, the actions taken by the trial court to give effect to Section 55, *i.e.*, fully enforce the substantive provisions of the FELA, are not preempted by the RLA. The Missouri Supreme Court's holding that such actions are preempted by the RLA is in direct conflict with this Court's holding in *Buell* that the RLA does not preempt an injured workers' claim because the FELA was independent of the CBA, notwithstanding the fact that the conduct causing the injury may have been subject to arbitration under the CBA. *Buell*, 480 U.S. at 564, 566-67.

In the case at bar, the Missouri Supreme Court rejected Plaintiff's Section 55 argument, stating that it was of no import in this issue because a termination doesn't cut off future wage loss claims under the FELA, citing *Martinez v. Union Pacific*

Railroad Co., 82 F.3d 223, 227-28 (8th Cir. 1996). However, what the Missouri Supreme Court failed to recognize is that there is case law to the contrary. *See, e.g., Sharkey v. Penn Central Transportation Co.*, 493 F.2d 685, 688 (2d Cir. 1974). To the extent that the Missouri Supreme Court's opinion becomes authority for the rule that trial courts may not enforce substantive FELA rights, including Section 55, because they are preempted by the RLA, such emasculation of the FELA would be contrary to Congress' intent in enacting the FELA and detrimental to railroad workers throughout the Country, especially in the districts where such opinions are binding precedent. One goal of the FELA is uniformity throughout the United States in the application of Congress' intent. The Missouri Supreme Court's opinion in this matter is an unwarranted misapplication of this Court's preemption doctrine announced in *Norris*. The Court should grant the Writ and decide this important federal question.

CONCLUSION

This case involves important issues which affect thousands of injured railroad employees. While Congress has passed laws governing the behavior of railroad employers, designed to protect railroad employees, the Supreme Court of Missouri has failed to properly apply such laws. Additionally, this case presents an opportunity for this Court to establish uniformity of application of these federal laws.

Accordingly, the Petitioner respectfully requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

JOSEPH L. BAUER, JR.
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APPENDIX

APPENDIX A — ORIGINAL PROCEEDING IN PROHIBITION OF THE SUPREME COURT OF MISSOURI FILED JANUARY 27, 1998

SUPREME COURT OF MISSOURI
EN BANC

No. 80014

State ex rel. Union Pacific Railroad Company and Missouri Pacific Railroad Company,

Relators,

v.

Honorable Robert H. Dierker, Judge, Circuit Court, St. Louis City,

Respondent.

ORIGINAL PROCEEDING IN PROHIBITION

This Court issued a preliminary order in prohibition to determine the scope of federal pre-emption under the Railway Labor Act (RLA), 45 U.S.C. secs. 151 et. seq. (RLA), as it might affect respondent's orders prohibiting relators, Union Pacific R.R. Co. and Missouri Pacific R.R. Co. (the railroad), from attempting to enforce provisions of collective bargaining agreements. The preliminary order is made absolute.

Plaintiffs in the underlying suit are employed by the railroad and in significant respects are representative of several hundred plaintiffs who have filed negligence suits for personal injuries under the Federal Employers' Liability Act (FELA), 45 U.S.C.

secs. 51-60, against their employers. The labor unions of which plaintiffs are members are parties to collective bargaining agreements with the railroad.

Plaintiff Harper filed an FELA suit on June 7, 1996, in the circuit court of the City of St. Louis seeking damages for personal injuries he allegedly sustained at work on April 17, 1996. Although Harper remains an employee of the railroad, he has not worked since May of 1996. On May 14, 1996, before Harper filed his FELA action, the railroad, by means of a form letter presented to him, directed Harper to provide a "doctor's note" documenting the following information: (1) his current medical condition; (2) his current medical treatment plan; (3) the date he could be expected to return to work in his normal duties or in a restricted capacity; and (4) the expected work restrictions, if any, recommended by his treating doctor for any return to work in a full or restricted capacity. On June 1, 1996, again before Harper filed his FELA action, he received a notice of a formal investigation and disciplinary hearing set for June 4, 1996, regarding his alleged failure to comply with the previous directive. On July 2, 1996, after filing his FELA action, Harper filed his motion for a protective order and for sanctions to prevent the railroad from requiring him to provide a "doctor's note" or thereafter be subjected to an investigation and disciplinary hearing. The railroad's formal investigation and disciplinary hearing was never held, and the court did not immediately hear Harper's motion for protective order. Seven months later, on February 3,1997, the railroad sent directly to Harper (not to his attorney), another letter similar to the May 14, 1996, form letter that required him to provide his supervisor with a "doctor's note" obtained within the past thirty days. In response, Harper submitted a "doctor's note" dated November 22, 1996. On February 14, 1997, the railroad sent Harper another letter that noted that the information he had

submitted had not been obtained during the past thirty days. This letter directed Harper to comply with the previous directive to provide information obtained within the prior thirty days. Harper did not submit any additional "doctor's notes." On February 26, 1997, respondent heard Harper's motion for protective order originally filed on July 2, 1996.

The facts in Plaintiff Stewart's case vary slightly from those in Harper's case. Stewart also filed an FELA suit in the same court on August 29, 1996, for injuries he allegedly sustained at work on January 12, 1996. Stewart is currently an employee of the railroad, but he is not actively working. After his alleged injury in January 1996, Stewart worked regularly through April 1996, when he began missing work. Beginning with a letter dated October 7, 1996, after Stewart had filed his FELA action, the Railroad sent Stewart letters approximately every thirty days extending his medical leave of absence and requiring him to continue to provide updated "doctor's note" to determine his fitness for duty and to support his leave of absence. The railroad, upon receiving the required information from Stewart's doctor, repeatedly extended his leave of absence for thirty day periods. In a letter dated December 18, 1996, however, the railroad directed Stewart to contact his supervisor to arrange for a fitness for duty evaluation. On January 6, 1997, the railroad sent Stewart a letter to notify him that an "FCE," a test administered by a physical therapist or other health care provider to gather information used to determine a person's ability to perform various job-related tasks, had been scheduled for him for January 16, 1997. In response, Stewart filed his motion for a protective order to prevent the railroad from requiring him to attend the FCE or thereafter be subjected to an investigation based upon his failure to attend. On January 15, 1997, respondent heard Stewart's motion for protective order.

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Plaintiffs' motions for protective orders asked the court to prevent the railroad from requiring them to provide medical documentation or to attend an FCE or thereafter be subjected to an investigation for failure to comply with the directives.

On March 17, 1997, respondent, citing the court's authority to control actions of the parties within the discovery arena, issued the challenged Rule 56.01 protective order against the railroad made applicable to both plaintiffs' cases. The order prohibits the railroad from directly communicating with plaintiffs concerning their health or employment status, from requiring plaintiffs to attend physical ability tests or other medical examinations, from disciplining plaintiffs for failing to comply with such requests, or from altering their employment status while their FELA suits are pending, unless it is for affirmative misconduct. Respondent expressed his intent to adhere to a uniform rule applicable in the circuit court of the City of St. Louis in all FELA cases: upon request by a plaintiff, a similar order will be issued unless the railroad can show affirmative misconduct or fraud on the court by the plaintiff. Relying in substantial part upon the exclusive jurisdiction provisions of the RLA, and upon affidavits that demonstrate that it is the regular practice of the railroad to require a medical evaluation for employees injured on or off the job, the railroad sought a writ of prohibition.

The issue is whether the trial court exceeded its jurisdiction in fashioning relief through a Rule 56.01 protective order applicable to numerous FELA cases filed in the circuit court of the City of St. Louis. Resolution of the issue depends in substantial part upon a determination of whether the RLA's mandatory arbitration provision confers exclusive jurisdiction over the dispute upon an RLA adjustment board. 45 U.S.C. sec. 153 First (i) and Second.

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The power of the United States Congress to pre-empt state law derives from the Supremacy Cause of Article VI of the United States Constitution. Whether a federal law pre-empts a certain state action is a question of congressional intent. *Hawaiian Airlines Inc. v. Norris*, 512 U.S. 246, 252 (1994). "The purpose of Congress is the ultimate touchstone." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985) (quoting *Retail Clerks Int'l. Ass'n, Local 1625 AFL-CIO v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

The RLA provides a comprehensive framework for the resolution of labor disputes in the railroad industry. *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562 (1987). The RLA establishes mandatory administrative procedures that govern two classes of labor disputes. *Hawaiian Airlines*, 512 U.S. at 252. Case law employs the terms "major disputes" and "minor disputes" to distinguish the two classes. "Major disputes," although not relevant here, arise "out of the formation or change of collective bargaining agreements covering rates of pay, rules, or working conditions." *Atchison*, 480 U.S. at 562; *see also* 45 U.S.C. sec. 151(a), 152 Seventh and sec. 156. "Minor disputes," which are relevant in this case, compose the second class of disputes. Minor disputes "gro[w] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." *Hawaiian Airlines*, 512 U.S. at 252-3; *see also* 45 U.S.C. sec. 151(a), sec. 152 Sixth, 153 First (i). Minor disputes involve "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Trainmen v. Chicago River & Indiana R.R. Co.*, 353 U.S. 30, 33 (1957). Succinctly stated, "major disputes seek to create contractual rights, minor disputes to enforce them." *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n.*, 491 U.S. 299, 302 (1989).

Courts look beyond the four corners of a collective bargaining agreement to determine what is a major or a minor dispute. In *Consolidated Rail*, where the only issue involved whether a controversy was a major or minor dispute, the United States Supreme Court determined that although neither party could point to an express provision of the collective bargaining agreement for support, the power to conduct return-from-leave physical examinations was an implied collective bargaining agreement term. *Consolidated*, 491 U.S. at 311-312. The Court noted that collective bargaining agreements may include implied terms that can be interpreted from the parties' "practice, usage, and customs." *Id.* at 311. The Court also observed that a collective bargaining agreement "covers the whole employment relationship. It calls into being a new common law — the common law of a particular industry or of a particular plant." *Id.* (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-579 (1960)); *see also Monroe v. Missouri Pacific R.R. Co.*, 115 F.3d 514 (7th Cir.), *cert. denied*, __ U.S. __, 118 S. Ct. 413 (1997) (finding that the collective bargaining agreement's implied terms provided the railroad with its right to compel an employee to undergo a physical examination); *Fry v. Airline Pilots Ass'n, Int'l*, 88 F.3d 831, 836 (10th Cir. 1996) (a "plaintiff's claims are minor disputes if they depend not only on a right found in the CBAs, but also if they implicate practices, procedures, implied authority, or codes of conduct that are part of the working relationship."). In *Hawaiian Airlines*, the United States Supreme Court discussed the fact that the terms of a collective bargaining agreement can be inferred from "norm[s] that the parties have created but have omitted from the collective bargaining agreement's *explicit* language. . . ." [emphasis in original] Id. at 264; *see also Allis-Chalmers*, 471 U.S. at 215-16 (collective bargaining agreements may contain implied as well as express terms).

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Minor disputes must be adjudicated under the RLA mechanisms. *Hawaiian Airlines*, 512 U.S. at 253. The RLA's statutory procedures for resolving minor disputes provide that these disputes must initially be addressed through a railroad's internal dispute resolution processes. *See* 45 U.S.C. sec. 184. If not settled, minor disputes must then be submitted to a division of the National Railroad Adjustment Board, or to a Public Law Board, which is an arbitration board chosen by the parties. *Consolidated Rail*, 491 U.S. at 303; *see also* 45 U.S.C. sec. 152 Sixth and sec. 153 First (i) and Second & sec. 184. Consequently, if the conflicts here are minor disputes, they must be resolved through the RLA's exclusive arbitral mechanisms, and plaintiffs' claims for protective orders are pre-empted by the RLA. *Hawaiian Airlines*, 512 U.S. at 253.

The purpose in passing the RLA was to develop a unified body of federal labor law and to encourage arbitration. *Atchison*, 480 U.S. at 565; *Allis-Chalmers*, 471 U.S. at 211, 220 (discussing policies of section 301 pre-emption under the Labor Management Relations Act (LMRA) that was determined as identical to the purposes behind the RLA pre-emption in *Hawaiian Airlines*, 512 U.S. at 263 n.9). The United States Supreme Court has noted that these purposes can be accomplished only by ensuring that parties to a collective bargaining agreement cannot avoid the mandatory arbitration procedures by reclassifying an action that otherwise involves a breach of a duty assumed in the agreement. *Allis-Chalmers*, 471 U.S. at 219-220; *Hawaiian Airlines*, 512 U.S. 246, 263 n.9. To achieve these goals, therefore, the RLA provides that minor disputes that grow out of the interpretation and application of the agreement will be resolved only through the RLA mechanisms. This guarantees that agreements are enforced by arbitrators who are experts in "the common law of [the] particular industry." *Consolidated*, 491 U.S. at 310 (quoting *Steelworkers*, 363 U.S. at 579).

The policy of fostering uniform, certain adjudication of disputes over the meaning of collective bargaining agreements cannot be achieved unless an arbitrator, not the court, has the responsibility to interpret the labor contract in the first instance. *See Allis-Chalmers Corp.*, 471 U.S. at 220 (discussing policies of section 301 pre-emption under the RLA's counterpart, the Labor Management Relations Act). If the resolution of a dispute purportedly having a remedy in state law depends upon the meaning of a collective bargaining agreement, the application of state law might lead to inconsistent interpretations of the agreement since there could be differing laws among the states. As a consequence, if the resolution of a dispute requires the interpretation of a collective bargaining agreement, the RLA's mandatory arbitration provision has been interpreted to eliminate the possibility of inconsistent interpretations of the agreement by providing that the application of state law is pre-empted by the RLA and that the dispute must be referred to the proper mandatory adjustment board. *See Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 324-25 (1972). In these instances, the court being asked to apply the state law would not possess subject matter jurisdiction. State law, therefore, is pre-empted, and federal labor law principles, which are uniform throughout the nation, are employed to resolve the dispute. If, however, the dispute can be resolved without interpreting the agreement, the claim is "independent" of the agreement and is not pre-empted. *Hawaiian Airlines*, 512 U.S. at 262 (quoting *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 410 (1988)). Merely referring to the agreement does not defeat state court subject matter jurisdiction. "The bare fact that a collective-bargained agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994); *see also Lingle*, 486 U.S. at 413 n.12. Unless plaintiffs can

establish that the employer's exercise of any rights it may have under the collective bargaining agreement is a direct violation of a specific law that confers an independent right upon plaintiffs, however, exclusive jurisdiction over the dispute lies with the National Railroad Adjustment Board. *Hawaiian Airlines*, 512 U.S. at 262-3.

The purposes behind the mandatory arbitral mechanisms of the RLA also apply in cases where there is an allegedly independent right arising out of another federal statute, rather than a state law. The United States Supreme Court, therefore, applies a similar pre-emption analysis in cases where a party claims that an independent right arising out of another federal statute prevents the RLA's mandatory arbitration procedures from pre-empting the matter. In *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, for example, a case alleging that the RLA pre-empted the bringing of an FELA cause of action, the railroad argued that a railroad employee's federal FELA action was pre-empted and the employee's sole remedy was through RLA arbitration because the employee's alleged injury resulted from conduct that was subject to the collective bargaining agreement. The United States Supreme Court confirmed that minor disputes subject to mandatory RLA arbitration are those that involve duties and rights created or defined by the collective bargaining agreement. *Id.* at 565-66. Although the employee's claim was based on a right arising out of a federal statute (FELA), the Court applied the same pre-emption analysis it had applied in cases involving possible RLA pre-emption of a right arising out of state law. *Atchison*, 480 U.S. at 565. Applying this pre-emption analysis, the Court rejected the railroad's argument that the entire FELA action was pre-empted by the RLA, emphasizing that the rights derived from the FELA were independent of the collective bargaining agreement. *Id.*

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Missouri is not without precedent in deciding whether the dispute in this case is a minor dispute. In *Brown v. Missouri Pacific R.R. Co.*, 720 S.W.2d 357 (Mo. bane 1986), *cert. denied*, 481 U.S. 1049 (1987), this Court addressed an employee's claims that requests for physical examinations were made in bad faith. The plaintiff sued the railroad under a state law theory of prima facie tort, alleging harassment in retaliation for filing an FELA suit. The alleged harassment was the railroad's insistence that the plaintiff submit to a physical examination to determine whether he was able to work. *Id.* at 357-58. This Court found that the railroad's "request for physical examination was clearly the employer's prerogative" and that the employee's complaints about retaliatory harassment for the railroad's request for a physical examination should be resolved by the compulsory arbitration tribunal. *Id.* at 360-361. As a consequence, the plaintiffs state law action was pre-empted by the RLA. *Id. See also Landfried v. Terminal R.R. Ass'n*, 721 F.2d 254 (8th Cir. 1983), *cert. denied*, 466 U.S. 928 (1994) (railroad disciplinary action against employee, even if motivated by a desire to retaliate against an FELA claimant, is within the exclusive jurisdiction of the National Railroad Adjustment Board because the collective bargaining agreement provides the source for the employee's right not to be discharged).

Phrased in terms of the language of the foregoing pre-emption analysis, this case is subject to the RLA's mandatory arbitration provision and within the exclusive jurisdiction of an arbitration board of the RLA. Resolution of this dispute depends upon interpretation of the meaning of the collective bargaining agreement. This is because it is necessary to interpret the implied terms of plaintiffs' collective bargaining agreements as exhibited by the company medical rules and the railroad's regular practices to determine whether the railroad has a right to issue such directives or whether plaintiffs have a right to be free from them.

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Because the dispute is one that must be resolved by interpreting the collective bargaining agreement, it is a minor dispute that must be referred to an RLA adjustment board established pursuant to the collective bargaining process.

Respondent presents various arguments asserting that the plaintiffs' rights in these cases should be deemed independent of the collective bargaining agreement, so as to defeat the exclusive arbitral mechanisms of the RLA. Respondent contends that since the Missouri Rules of Civil Procedure govern discovery in an FELA case, the Rules grant the court independent authority that does not depend on the terms of the collective bargaining agreement. Respondent is correct in his assertion that the Rules of Civil Procedure control discovery in an FELA suit. Unless respondent can point to a specific Rule that confers an independent state law right upon plaintiffs in this case, however, this Court declines to comment on the notion that the Rules generally provide the plaintiffs with independent rights.

In addition to the general argument relative to the discovery rules, respondent claims that Rule 60.01 confers the independent rights to be free from any employer requests relating to the employees' physical conditions or from subsequent disciplinary actions during the pending FELA action and to be free from requirements that the employees attend an FCE. The scope of Rule 60.01 is not so broad. Rule 60.01 establishes the procedure through which a litigant may obtain an examination of his opponent where the opponent's physical condition is at issue. Rule 60.01 does not bestow any rights upon the examinee other than the right to receive a copy of the report of the examination procured by the opposing party.

In support of respondent's foregoing arguments that the Rules create an independent right to be free from employer directives

regarding the employees' physical conditions during the pending FELA action, plaintiffs rely on cases from federal district courts in other states; however, the cases cited by plaintiffs are not more persuasive than our own federal decisions of the United States District Court for the Eastern District of Missouri or those of other federal districts that support the contrary position. *See Boncouri v. Union Pacific R.R. Co.*, __ F. Supp. __, 1997 WL 688481 (E.D. Mo. 1997) (denying FELA plaintiff's motion for protective order to prohibit railroad from investigating plaintiff finding that issues involved in motion were minor disputes that must be resolved through the RLA mechanisms); *Downing v. Missouri Pacific R.R. Co.*, 4:96CV0284 LOD (E.D. Mo. 1996) (order denying plaintiffs' motion to remand) (FELA plaintiff petitioned for a TRO to prevent the railroad from requiring him to attend a "fitness for work" physical or from disciplining him for failure to attend. The court issued an order finding pre-emption determinative of the issue because resolution of the dispute required interpretation and enforcement of the collective bargaining agreement); *see also Williamsonv. Missouri Pacific R.R. Co.*, 4:96CV1113 ERW (E.D. Mo. 1 996) (order dismissing plaintiff's motion to remand) (although the issue was declared moot because plaintiff withdrew his motion for protective order requesting freedom from a "fitness for duty" examination and a subsequent investigation, the court noted that resolution of the issue would have required an interpretation of the collective bargaining agreement implicating the mandatory RLA mechanisms).

Plaintiffs in the underlying case, arguing on behalf of respondent, make additional arguments in support of respondent's order. Plaintiffs contend that because the formal collective bargaining agreement document does not include the specific terms and conditions at issue here, resolution of the dispute does not depend upon interpretation of the collective bargaining agreement;

therefore, the RLA does not pre-empt these matters. Plaintiffs' position disregards, however, the law that provides that if resolution of an issue requires interpretation or application of the express or implied terms of a collective bargaining agreement, which include practices, procedures, implied authority, or codes of conduct, the RLA pre-empts the resolution of that issue. *Fry v. Airline Pilots Ass'n*, 88 F.3d 831, 836 (10th Cir. 1996); *Brown v. Missouri Pacific RR. Co.*, 720 S.W.2d at 361. Here, as noted above, resolution of the dispute depends upon interpretation of the meaning of the collective bargaining agreement because it is necessary to interpret the implied terms of the agreement as exhibited by the company medical rules and the railroad's regular practices to determine whether the railroad has a right to issue directives such as in this case or whether plaintiffs have a right to be free from them.[1]

Plaintiffs maintain that the resolution of the dispute requires a "purely factual inquiry" of the railroad's conduct that is independent of the collective bargaining agreement. Plaintiffs make a related argument that the RLA does not pre-empt so long as the face of the plaintiffs' claims do not allege a breach of the express

1. Plaintiffs appear to make another argument. Although plaintiffs' contentions are far from clear, they are without merit to the extent that they argue that pre-emption analysis cannot apply here because plaintiffs are not attempting to maintain a separate state "cause of action" with their request for a protective order. In *Livadas v. Bradshaw*, 512 U.S. 107, 117-132 (1994), a case involving the National Labor Relations Act (the federal law counterpart to the RLA for industries not covered by the RLA), the United States Supreme Court held that the National Labor Relations Act pre-empted a state's practice of construing all state statutes as inapplicable to employees whose employment was governed by collective bargaining agreements. *Lavadas* resolved the issue of whether pre-emption can apply to matters other than those that establish a "cause of action." *Lavadas* involved the pre-emption of a state law practice, policy, or rule rather than the pre-emption of an entire "cause of action."

terms of the collective bargaining agreement. Plaintiffs claims are mistaken. Irrespective of how the disputes in this case may be labeled, they are substantively "minor disputes," pre-empted by the RLA. *See Brown v. Missouri Pacific R.R Co.*, 720 S.W.2d at 360. Contrary to plaintiffs' assertions, their claims do not involve purely factual questions, and they do require interpretation of the collective bargaining agreement. Plaintiffs claims are inextricably related to matters that depend upon interpretation of the collective bargaining agreement. This finding, however, does not leave all plaintiffs without remedies in the event of a finding of bad faith in an individual plaintiff's case, *see infra.*

Plaintiffs also allege that 45 U.S.C. sec. 55 and Missouri Rule 4.2 confer rights independent of the collective bargaining agreement. To support their arguments, plaintiffs analogize to cases involving alleged violations of 45 U.S.C. section 60 where courts, not the RLA adjustment boards, possess exclusive jurisdiction. Section 60 prohibits the railroads from interfering with persons who attempt to provide information regarding another's FELA claim. This section applies, however, only to confer independent rights upon non-FELA claimants who provide information for other employees' FELA claims. *Bielicke v. Terminal R.R. Ass'n*, 30 F.3d 877, 878 (7th Cir. 1994). Respondent specifically and correctly found that the section 60 cases do not control. Section 60 does not confer an independent right upon the FELA plaintiffs.

Comparing their claims to the cases in which section 60 has been determined to confer an independent right on non-FELA claimants, plaintiffs maintain that 45 U.S.C. section 55 provides plaintiffs with rights that are independent of the collective bargaining agreement. Section 55 prohibits a railroad from using any contract, rule, or device to exempt itself from any liability

created by the FELA. Plaintiffs argue that protective orders are necessary to prevent the railroad from reducing its FELA liability in violation of section 55 by firing its employees (allegedly for failing to comply with the railroad's requests for "doctor's notes" and to attend FCEs) to eliminate the employees' damage claims for future wage loss. Respondent, however, expressly rejected this argument, stating that a discharge by the railroad does not necessarily terminate the employees' claims of future wage loss. Respondent's rejection of the argument is well grounded in law. *See Martinez v. Union Pacific R.R. Co.*, 82 F.3d 223, 227-8 (8th Cir. 1 996).

Plaintiffs allege that Rule 4.2, a rule of professional conduct related to contact with represented parties, also confers rights independent of the collective bargaining agreement. Plaintiffs' allegation is conclusory in nature, the facts alleged in support being indistinct. The allegation does not require response.

Plaintiffs also present arguments touching upon the accuracy of respondent's factual findings and a procedural issue relative to Rule 92. Because this Court finds that resolution of this dispute requires interpretation of the collective bargaining agreement, it is not necessary to address plaintiffs' additional arguments.

In sum, respondent is without authority to prevent the railroad from exercising its rights under a collective bargaining agreement by issuance of a uniform order to cover all plaintiffs in all FELA cases in the circuit court of the City of St. Louis. Plaintiffs' claims, collectively and individually, for a protective order to prevent the railroad from requiring them to provide medical documentation or to attend an FCE are pre-empted by the RLA. The RLA arbitral board designed to hear the minor disputes of these parties possesses exclusive jurisdiction of this dispute. In

so holding, this Court does not purport to rule on the propriety of the railroad's actions in any FELA cases. The issue before this Court is not whether the railroad's action gives the railroad an unfair advantage or whether the protective order should be granted. The issue is whether the mandatory arbitration provisions of the RLA control.

Plaintiffs are not without remedies. Their assertions that the railroad's actions are intended to interfere with plaintiffs' ability to proceed with their FELA actions and that the railroad's true motive is to cut off FELA liability for future wages could prevail in arbitration. Moreover, the railroad's exercise of any rights it has to hold an investigative or disciplinary hearing should not deny plaintiffs the right to maintain their FELA actions. Additionally, in the FELA case itself, the trial court remains authored to employ its conventional trial court powers to control the parties and the litigation in the underlying FELA action.

For the foregoing reasons, respondent is not authorized to issue the protective orders. The RLA adjustment board established pursuant to the RLA possesses exclusive jurisdiction of these minor disputes. The preliminary order in prohibition is made absolute.

Ann K. Covington, Judge

Benton, C.J., Price, Limbaugh, Robertson and Holstein, JJ., concur; White, J., concurs in separate opinion filed; Price, J., concurs in opinion of White, J.

Appendix A

Concurring Opinion

I concur fully in the principal opinion, but write separately to express my understanding of the limited scope of the Court's ruling. As the principal opinion holds, the blanket protective order issued by respondent, absent any showing of an attempt to abuse the discovery process in the particular cases that are the subject of this dispute. effectively destroys relators" ability to enforce their rights under the collective bargaining agreements. It was an abuse of discretion for the trial court to enter such a sweeping protective order.

APPENDIX B — ORDER OF THE MISSOURI COURT OF APPEALS FOR THE EASTERN DISTRICT DENYING WRIT OF PROHIBITION DATED MAY 28, 1997

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. 72583

STATE OF MISSOURI ex rel. UNION PACIFIC RAILROAD COMPANY and MISSOURI PACIFIC RAILROAD COMPANY

Realtors,

v.

HONORABLE ROBERT H. DIERKER, JR.,

Respondent.

ORDER

Relators have filed a Petition for Writ of Prohibition along with Exhibits and Suggestions in support.

Being duly advised in the premises, Relators' Petition for Writ of Prohibition is denied.

May 28, 1997

s/ Lawrence G. Crahan
Judge Lawrence G. Crahan
Presiding Judge
Writ Division Seven

Appendix B

cc: Dan H. Ball
H. Chris Christy
Leonard P. Cervantes
Joseph Bauer
Hon. Robert H. Dierker, Jr.

APPENDIX C — MEMORANDUM AND ORDER OF THE MISSOURI CIRCUIT COURT, TWENTY-SECOND CIRCUIT DATED MARCH 17, 1997

MISSOURI CIRCUIT COURT
TWENTY-SECOND CIRCUIT
(City of St. Louis)

No. 962-07894
Div. 1

DANIEL STEWART,

Plaintiff,

v.

MISSOURI PACIFIC RAILROAD CO., et al.,

Defendants.

No. 962-07038
Div. 1

JOHN E. HARPER,

Plaintiff,

v.

MISSOURI PACIFIC RAILROAD CO., et al.,

Defendants.

Appendix C

MEMORANDUM AND ORDER

The Court must again put its shoulder to the wheel in an effort to resolve disputes arising in FLEA cases, as a result of the railroad employer's persistent efforts to utilize the employment relationship to obtain information from the plaintiffs, or to impose discipline on allegedly disabled plaintiffs. The Court has no intention of rehashing the proceedings conducted by this Court (Dowd, P.J.) during 1996. Suffice it to say that the Court has previously considered the same issues. The Court takes judicial notice of its findings and orders in *Duren v. Missouri Pacific Railroad Co., et al.*, 22nd Circuit No. 942-1584, and in *Hammon v. Missouri Pacific, Railroad Co. etc.*, 22nd Circuit No. 952-01755.[1]

Two cases are now before the Court. In *Stewart*, plaintiff has requested a protective order to prohibit the railroad from requiring him to participate in a functional capacity examination as directed by his supervisors, or to preclude use of evidence derived from the examination at trial. In *Harper*, plaintiff seeks a protective order prohibiting the railroad from sending him to a medical examination or a physical capacity evaluation, from requiring him to provide medical documentation, and from conducting an "investigation" (a term of art in railroad labor relations) or disciplining him for refusing to submit to such examinations or requests for documentation.

Plaintiffs (both of whom allege that they are permanently and totally disabled) argue that it is demonstrably unfair to permit the railroad to use its position as employer to extract information from plaintiffs, and that actions aimed at the plaintiffs' employment

1. Materials in *Duren* have been filed in support of the motion for protective order in *Harper*.

status are designed to "chill" plaintiffs' exercise of rights under the FLEA and, in addition, could adversely (and artificially) affect plaintiffs" claims of future damages,

The railroad opposes both motions for protective orders, arguing that this Court lacks jurisdiction to grant most of the relief requested (the railroad concedes that this Court has the authority to control what evidence shall be admitted at trial), and urging factual grounds peculiar to each plaintiff as additional grounds to deny the motions.

The gravamen of the dispute before the Court is plaintiffs' fears that the railroad's actions will interfere with the plaintiffs' ability to present their FLEA claims and recover damages. Because the dispute is recurring and continues to draw the Court into collateral disputes between the parties, the Court elected to reexamine the matter, in order to understand the issues fully and, if necessary, explicate its reasons for adhering to prophylactic measures adopted in other cases.

Almost invariably, FLEA plaintiffs remain on the employment rolls of the railroad, at least until any claim of total disability is resolved. As a result, the railroad seems to determined to extract advantage from the continuing employment relationship. This advantage is sought in two ways: by demanding medical information or submission to medical or vocational evaluation by the plaintiff, and by instituting disciplinary proceedings when the information or examination is not forthcoming.

Rule 56.01(c), Mo.R.Civ.P., provides:

> Upon motion by a party . . . , and for good cause shown, the court may make any order which justice

> requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (1) that the discovery not be had . . . [there follows a list of seven additional specific limitations].

Read in context, Rule 56.01(c), and, indeed, the entirety of Rule 56,01, applies only to discovery in civil cases. It is not a broad grant of authority to grant injunctive relief.

Plaintiffs in these cases are members of labor unions which are parties to collective bargaining agreements with the railroads. Any discipline meted out to plaintiffs is subject to grievance remedies under the collective bargaining agreement or the Railway Labor Act. Ordinarily, disputes arising under the collective bargaining agreement are outside the jurisdiction of state course. However, the Railway Labor Act simply does not preempt state law claims which are independent of the collective bargaining agreement, and would not require interpretation of that agreement. See *Hawaiian Airlines. Inc. v. Norris*, 114 S.Ct. 2239 (1994); *Brown v. Missouri Pacific RR. Co.*, 720 S.W.2d 357 (Mo.banc 1986).

Under the FELA, no specific remedy is available to prevent railroad retaliation against an employee who invokes his rights under the Act. The only statutory remedy available relates wholly to railroad efforts to suppress or deter the giving of information by railroad employees in connection with FELA claims. 45 U.S.C. §60. The problem is that invocation of this remedy in state court, involving a claim arising out of intentional conduct by the railroad, permits the railroad to remove the action to federal court—anathema to all right-thinking plaintiffs. See *Lewis v. Louisville*

& Nashville R. Co., 758 F.2d 219 (7th Cir. 1985). In the absence of an express statute, railroad disciplinary actions against employees, even if motivated by a desire to wreak vengeance on a FELA claimant, necessarily come within the ambit of the Railway Labor Act, are subject to grievance under collective bargaining agreements, and are within the exclusive jurisdiction of the National Railroad Adjustment Board. *Landfried v. Terminal Railroad Ass'n*, 721 F.2d 254 (8th Cir. 1983).

This Court has already found that the railroad defendants are not proceeding in good faith in taking the sort of actions here at issue. There is abundant evidence to suggest that only employees with pending FELA claims encounter demands to report for "back to work" physicals and the like. The Court will not second-guess previous findings. There can be little question that the railroad would not be initiating these requests, examinations, or disciplinary proceedings if it saw no advantage to it.

On the other hand, the Court is puzzled at the plaintiffs' insistence that the railroad's actions will harm their cases, even though evidence at trial that the railroad proceeded to fire a disabled worker would not seem to be the best way to get a jury on the railroad's side. Surely if a man is disabled, the railroad's decision to fire him will have no relevancy whatever to the issue of damages, absent evidence that reasons unrelated to the injury produced the dismissal (e.g., a violent assault on a supervisor). Similarly, if a plaintiff is *not* in fact disabled, the railroad would seem well within its rights to dismiss him for refusing to return to work, and the refusal to return to work would be relevant on the issue of mitigation of damages.

The Court has serious reservations about its authority to control actions of the parties before it which are outside the

discovery arena. To be sure, retaliation against an employee who files a FELA claim is to be deplored,[2] but the protective orders at issue here threaten to draw (indeed, have drawn) the Court into extensive proceedings on what are really collateral matters.[3] This Court does not sit as a grievance board for FELA plaintiffs.

---

2. Presumably, such retaliatory action would be subject to remedy by the National Railroad Adjustment Board. However, as noted above, there is no express statute barring retaliation, and Missouri strictly limits the ability of employees to bring actions for "wrongful discharge" in the absence of an express statute, regulation or contract. See *Luethans v. Washington University*, 894 S.W.2d 169 (Mo.banc 1995); see also *Mayon v. Southern Pacific Transportation Co.*, 805 F.2d 1250 (5th Cir. 1986); *Schrader v. CSX Transportation. Inc.*, 70 F.3d 255 (2nd Cir. 1995); *Graf v. Elgin, Joliet & Eastern Ry. Co.*, 790 F.2d 1341 (7th Cir. 1986).

3. Plaintiffs appear to believe that a discharge necessarily terminates claims of future wage loss. In *Rogers v. Thompson*, 265 S.W.2d 282 (Mo.banc 1954), the Court reversed a FELA judgment because the trial court declined to instruct the jury that the plaintiff could not recover lost earnings which would have accrued after the date of his discharge for misconduct in connection with the railroad accident in which he was injured. The case stands for the proposition, still valid today, that a plaintiff may not recover damages for a loss not shown to be a proximate consequence of defendant's wrong. 265 S.W.2d at 289. The case does not stand for the proposition that a discharge which is the result of the plaintiff's injuries, rather than a result of the employee's fault or misconduct, bars a claim for future earnings. *Id.* at 288. In *Rogers*, the conductor was discharged for causing the train collision in which he was injured. The discharge wee held to limit damages in the form of lost earnings after the date of discharge.

This Court does not perceive how a discharge which is attributable to plaintiff's physical condition can serve to limit the railroad employer's liability for damages. Whether the employee plaintiff is totally disabled is surely a jury question. If he was not totally disabled, and refused to return to work on demand, he has failed to mitigate damages. See *Kauzlarich v. Atchison T. & S.F. Ry. Co.*, 910 S.W.2d 254 (Mo.banc 1995). If was in fact-totally disabled, and the

(Cont'd)

Appendix C

Were the Court writing on a blank slate, it would prefer to impose a limited protective order, forbidding the railroad to offer—or even use in any way in the FELL case—evidence concerning the plaintiffs' performance at, or refusal to participate in, coerced examinations, or evidence concerning disciplinary actions taken against plaintiffs solely on account of their alleged failure to report for an examination or to return to work (unless plaintiff sought to have such evidence admitted). This preferred alternative would utilize Rule 56.01 to erect a "Chinese wall" between the employer-employee battlefield and the FELL action.[4]

However, the Court does not write on a blank slate. The railroad's good faith remains questionable, and the record is bereft of evidence that the railroads labor situation is 80 critical that it must be allowed to coerce employees into returning to work. The Court unquestionably does have jurisdiction to enter orders in the context of FELA actions which will protect the Court's jurisdiction to hear and decide such actions fairly.

(Cont'd)
railroad discharged him because he would not report to work, the jury would not be restricted in considering future wage loss. The reasons why the railroad dismissed him would seem to be a question of fact, to be resolved by the jury in the course of considering the plaintiff's claims for damages and the railroadis affirmative defense of mitigation.

4. Another palliative which seems ready at hand is to limit a railroad to one physical examination or functional capacity evaluation of the FELA plaintiff; if the railroad chooses to compel an examination in the guise of employer, it should not be entitled to another in the guise of litigant. Nothing in Rule 60.01(a) *requires* that the Court always afford a litigant an "IME." An order under Rule 60.01(a) may also be conditioned upon agreement by the railroad that it will not engage in the "hack to work physicals' ploy during the pendency of the FELA action.

Appendix C

Come what may, this Court cannot and will not allow itself to be drawn into extensive proceedings concerning railroad employee disciplinary matters. There are over 500 FELA actions pending in this Circuit, which utilizes a master calendar, supervised almost exclusively by the undersigned. The demands imposed on the Court's time by these procedural wrangles are intolerable. There can be little doubt that only a "bright line" order will minimize the burden of these issues on the Courts time. In the cases captioned above, and in all other cases on this Court's docket, the Court intends to adhere to a uniform rule: during the pendency of a FELA action, at the request of the plaintiff employee, and in the absence of any showing by the railroad employer that the employee is committing a fraud on the court, the Court will enter a standard protective order identical to text which in set forth below.

ORDER

For the foregoing reasons, it is

ORDERED that plaintiff Harpers motion for a protective order in *Harper v. Missouri Pacific Railroad Co.* be and the same is hereby granted, and defendant is hereby ordered to maintain plaintiff Harper on its rolls as an active employee pending disposition of the case of *Harper v. Missouri Pacific RR. Co.*, No. 962-7038, and defendant is further ordered not to direct any communication to plaintiff concerning his health or employment status, without notice to plaintiff's counsel, and defendant is further ordered not to take any action to alter or reduce plaintiff Harperis seniority with the railroad, and defendant is further ordered not to require or attempt to require plaintiff Harper to appear for any medical or functional capacity examination, except on order of Court granted under Rule 60.01, Mo.R.Civ.P.;

provided, that nothing in this order shall be construed to prohibit defendant from taking disciplinary action against plaintiff for affirmative misconduct such as dishonesty, assault on a superior, or the like; and it is

FURTHER ORDERED that plaintiff Stewart's motion for a protective order be and the same is hereby granted, and defendant is ordered to maintain plaintiff Stewart on its rolls as an active employee pending disposition of the case of *Stewart v. Missouri Pacific RR. Co.*, No. 962-7894, and defendant is further ordered not to direct any communication to plaintiff concerning his health or employment status, without notice to plaintiff's counsel, and defendant is further ordered not to take any action to alter or reduce plaintiff Harper's seniority with the railroad, and defendant is further ordered not to require or attempt to require plaintiff Stewart to appear for any medical or functional capacity examination; provided, that nothing in this order shall be construed to prohibit defendant from taking disciplinary action against plaintiff for affirmative misconduct such as dishonesty, assault on a superior, or the like; and it is

FURTHER ORDERED that defendants shall pay the plaintiffs their reasonable attorney's fees and expenses in connection with obtaining this order.

SO ORDERED:

s/ Robert H. Dierker, Jr.
Robert H. Dierker, Jr.
Presiding Judge

Dated: March 17, 1997

Appendix C

cc: Counsel of record: Joseph Bauer
Leonard P. Cervantes
H. Chris Christy
Dan H. Ball

APPENDIX D — ORDER OF THE CLERK OF THE SUPREME COURT, STATE OF MISSOURI DENYING MOTION FOR REHEARING DATED FEBRUARY 24, 1998

CLERK OF THE SUPREME COURT
STATE OFMISSOURI
POST OFFICE BOX 150
JEFERSON CITY, MISSOURI
65102

Thomas F. Simon
Clerk

Telephone
(573) 751-4144

February 24, 1998

Mr. Joseph L. Bauer, Jr.
Mr. Michael L. Nepple
Suite 350
1010 Market Street
Sta. Louis, Missouri 63101

Mr. Leonard P. Cervantes
1007 Olive Street
St. Louis, Missouri 63101

In re: State ex rel. Union Pacific Railroad Company and Missouri Pacific Railroad Company vs. Honorable Robert H. Dierker, Judge, Circuit Court, St. Louis City Supreme Court No. 80014

Dear Counsel:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Respondent's motion for rehearing overruled."

Appendix D

Yours very truly,

THOMAS F. SIMON

Christina S. Vinson
Deputy Clerk, Court en Banc

cc: Mr. Dan H. Ball, Mr. James w. Erwin
and Mr. David A. Dick
Mr. H. Chris Christy
Mr. James P. Holloran
Mr. Robert F. Ritter
Mr. Jerome J. Schlichter, Mr. Steven L. Groves
and Mr. Nelson G. Wolff

APPENDIX E — STATUTE INVOLVED

45 U.S.C. § 55

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Supreme Court, U.S.
FILED
JUN 23 1998
CLERK

No. 97-1916

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JOHN E. HARPER,
Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY
and MISSOURI PACIFIC RAILROAD COMPANY,
Respondents.

On Petition for a Writ of Certiorari
to the Missouri Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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LIST OF PARTIES

Respondents agree with Petitioner Harper's summary of the parties involved. Union Pacific Corporation is the parent corporation of Union Pacific Railroad Company. The non-wholly owned subsidiaries of Union Pacific Railroad Company are Alameda Belt Line, Automated Monitoring & Control, Inc., Belt Railway Company of Chicago, Brownsville and Matamoros Bridge Company, Central California Traction Company, Denver Union Terminal Railway Company, Harbor Belt Line Railroad, Houston Belt & Terminal Railway Company, Kansas City Terminal Railway Company, Longview Switching Company, MT Properties, Inc., Oakland Terminal Railway Company, Peoria & Pekin Union Railway Company, Portland Terminal Railroad Company, St. Joseph Terminal Railroad Company, St. Joseph & Grand Island Railway Company, Sunset Railway Company, Terminal Railroad Association of St. Louis, Texas City Terminal Railway Company, TTX Company, Union Pacific de Mexico, and Wichita Union Terminal Railway Company.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Union Pacific Railroad Company and Missouri Pacific Railroad Company respectfully request this Court to deny Petitioner John E. Harper's Petition for a Writ of Certiorari to review the judgment of the Supreme Court of Missouri.

STATUTES INVOLVED

45 U.S.C. § 151a.

> The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 153(i) First

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by

either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

45 U.S.C. § 55

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

STATEMENT OF THE CASE

This proceeding arises out of a "protective order" entered in the case of *John Harper v. Missouri Pacific R.R. Co. and Union Pacific R.R.. Co.*,[1] No. 962-07038, currently pending in the Circuit Court of the City of St. Louis, Missouri. Harper was employed by Union Pacific as a carman in North Little Rock, Arkansas. He filed this suit pursuant to the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, for damages arising out of an injury to his low back alleged to have been suffered at work.

Petitioner's Statement of the Case does not accurately state the facts pertinent to his Petition[2] and it entirely omits other

[1] Missouri Pacific Railroad Company has merged into Union Pacific Railroad Company and is no longer a corporate entity. Thus, the interests of Missouri Pacific are the interests of Union Pacific, and this Brief will refer only to Union Pacific.

[2] For example, Harper states that Union Pacific "does not dispute that it has failed to comply with the rules of civil procedure regarding discovery." Pet. at 4. Union Pacific has consistently disputed this point, as evidenced most

(Footnote 2 continued on next page)

critical facts. Accordingly, Union Pacific submits its own statement of the facts relevant to this case.

The terms and conditions of Harper's employment with Union Pacific are governed by a collective bargaining agreement between the International Brotherhood of Railway Carmen and Union Pacific. The union agreement includes a rule which allows employees a leave of absence for medical or other reasons, not to exceed thirty days. The leave of absence may be renewed for additional thirty day periods. The same rule provides that the arbitrary refusal by the company of a reasonable amount of leave may be appealed by the employee as a claim for "unjust treatment" through grievance procedures established by the collective bargaining agreement.

Harper alleges that he injured his back on the job on April 17, 1996. During early May 1996, Harper stopped reporting to work, and has not actively worked since May 1996. On May 14,

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(Footnote 2 continued)

prominently by its successful petition for a writ of prohibition below. Harper also states that Union Pacific "does not dispute that it has initiated ex parte communications with employees who are represented by counsel." *Id.* Railroad management personnel, including Harper's supervisors, routinely communicate with the employees in their departments. Indeed, this is such a common incident of the employment relationship as not to excite comment in any but an FELA suit. Union Pacific's counsel has not, as Harper suggests, engaged in any "ex parte" contacts within the meaning of the ethical rules. No court has found that Union Pacific engaged in such contacts, and Union Pacific certainly has not "admitted" such contacts. Much of Petitioner's Statement of the Case consists of excerpts from depositions and other documents in other cases, taken out of context and supplemented by his slanted commentary. Pet. at 3-9. Notably, however, the trial court in this case conducted no evidentiary hearing and made no such findings other than to refer to prior decisions by another circuit judge "that the railroad defendants are not proceeding in good faith in taking the sort of actions here at issue." Pet. App. at 24a. The other orders were also entered without any evidentiary hearing.

1996, Union Pacific notified Harper that he should provide within two weeks a "doctor's note," or documentation explaining his absence from work. Harper ignored the request. On June 1, 1996, Union Pacific sent Harper a notice of a formal investigation and disciplinary hearing pursuant to the collective bargaining agreement scheduled for June 4, 1996 to determine whether he should be disciplined for failing to provide documentation to support his leave of absence, as instructed by his supervisor and as necessary under the collective bargaining agreement. The June 4 hearing was postponed.[3]

Harper filed his FELA suit on or about June 10, 1996 in the Circuit Court of the City of St. Louis. On July 2, 1996, Harper filed a motion for protective order and sanctions complaining about the directive that he document his leave of absence and the disciplinary hearing once scheduled for June 4. *See* Respondent's Appendix, R.A. at A-1. The motion sought to prohibit Union Pacific from (1) requiring him to submit any medical information to support his leave of absence from work; (2) requiring him to attend any type of physical evaluation; and (3) disciplining him for failing to supply medical information, attend an evaluation, or for any other type of insubordination. R.A. at A-3.

Petitioner did not seek any action on his motion for protective order and his leave of absence was renewed several times by Union Pacific. Seven months later, on February 3, 1997, Harper's supervisor directed him to provide a doctor's note signed within the last thirty days to substantiate his medical need

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[3] The hearing originally scheduled for June 4, 1996 was finally allowed to proceed on May 26, 1998, as a result of the decision below. Harper was found to have violated company rules. Union Pacific employs a progressive discipline policy, and because of Harper's history of disciplinary violations, this most recent disciplinary violation resulted in his dismissal from employment. As of the date of the filing of this Brief in Opposition, Petitioner has not taken steps to pursue any further remedies under the collective bargaining agreement.

to stay off work. Harper submitted a doctor's note dated November 22, 1996, which indicated that his condition was improving. On February 14, 1997, Union Pacific wrote Harper, pointing out that the note he had submitted was not current because it was more than thirty days old, and reiterating its request for current medical documentation. Harper's response was to set the long dormant motion for protective order for a hearing. He never amended or supplemented the motion; therefore, the motion as presented to the trial court did not mention the February 3 and 14, 1997 letters. At the hearing, the trial court took the motion under submission, and in the interim, prohibited Union Pacific from conducting any investigation or taking any disciplinary action authorized by the collective bargaining agreement.

On March 17, 1997, the trial court entered the protective order at issue. While much of the order criticized Harper's arguments, *see* Pet. App. 24a-25a, fn.2 & 3, the trial court, purporting to act pursuant to Mo. R. Civ. P. 56.01(c) in controlling discovery in the personal injury suit, entered an order which (1) required Union Pacific to "maintain" Harper on its "rolls as an active employee pending disposition" of his FELA case; (2) prohibited Union Pacific from taking "any action to alter or reduce [Harper's] seniority;" (3) prohibited Union Pacific, including Harper's immediate supervisors, from contacting him concerning his health or employment status, without notice to his counsel; and (4) prohibited Union Pacific from requiring Harper to appear for any physical evaluation, including any such examination authorized by the collective bargaining agreement, unless the trial court expressly ordered him to do so after a ruling on a motion for such an examination pursuant to Mo. R. Civ. P. 60.01. Pet. App. 27a. The only exception to this broad "protective order" permitted Union Pacific to take disciplinary action only if it proved, presumably to the trial court's satisfaction, that the employee engaged in "affirmative misconduct such as dishonesty, assault on a superior, or the like." Pet. App. 28a.

Union Pacific filed a petition for writ of prohibition in the Supreme Court of Missouri, arguing principally that the Railway Labor Act (RLA), 45 U.S.C. § 151,*et seq.*, preempts "minor disputes" such as this which arise out of the collective bargaining agreement and the employment relationship. On January 28, 1998, the Supreme Court of Missouri made its preliminary writ of prohibition absolute. Pet. App. 1a-16a; *State ex rel. Union Pacific R.R. Co. v. Dierker*, 961 S.W.2d 816 (Mo. banc 1998). The court below held that the trial court lacked jurisdiction to enter the protective order because the issue of Union Pacific's right to require a physical examination pursuant to the collective bargaining agreement and to discipline Harper for his refusal to submit to such an examination was a "minor dispute" requiring the interpretation and application of the collective bargaining agreement, and thus was preempted by the Railway Labor Act.

REASONS FOR DENYING THE WRIT

Petitioner does not assert that the decision of the Supreme Court of Missouri conflicts with the decision of another state court of last resort or that it conflicts with the decision of any United States Court of Appeals. The sole basis for the Petition is the alleged conflict between the decision below and this Court's decisions in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994) and *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987). However, Petitioner arrives at this so-called conflict only by misstating the holding of the Missouri Supreme Court. In fact, the decision below is entirely consistent with the prior decisions of this Court, including *Hawaiian Airlines* and *Buell*, in its application of federal law. The Court should deny the petition for a writ of certiorari.

I.

Petitioner first poses the issue of whether the Railway Labor Act preempts a state trial court from controlling discovery and "abusive tactics" supposedly used by Union Pacific in defending a claim brought by its employee pursuant to the FELA for personal injury damages. Petitioner argues that the RLA does not preempt the substantive protections of the FELA, citing *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994) and *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987). This proposition, while true enough in the abstract, has no application to this case because the FELA does not provide "substantive protections" which provide the kind of guarantees the protective order purported to give here. Rather, the protections for Petitioner's employment rights are found in the collective bargaining agreement and those rights can only be enforced through the grievance and arbitration procedures authorized by the Railway Labor Act.

The RLA preempts "minor disputes," or issues which involve interpretation or application of a collective bargaining agree-

ment. *See* 45 U.S.C. § 153(i) First. Minor disputes include controversies over how to give effect to collective bargaining agreement rights, or the meaning of the collective bargaining agreement in a particular situation. *Hawaiian Airlines*, 512 U.S. at 253. Courts look beyond the four corners of a collective bargaining agreement to determine whether a particular dispute is a minor dispute, because a "collective bargaining agreement is more than the sum of its parts. It comprises express provisions, industry standards, and 'norms that the parties have created but have omitted from the collective bargaining agreement's express language.'" *Fry v. Airline Pilots Ass'n*, 88 F.3d 831, 836 (10th Cir. 1996), *quoting Hawaiian Airlines*, 512 U.S. at 264. A litigant cannot avoid RLA preemption by merely recasting his claim as involving a state or federal right, or by otherwise attempting to artfully plead around preemption. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985)(LMRA preempted a state tort claim for bad faith handling of an insurance claim); *Monroe v. Missouri Pacific R.R. Co.*, 115 F.3d 514 (7th Cir. 1997)(RLA preempted claims that required interpretation of implied collective bargaining agreement terms), *cert. denied* 118 S.Ct. 413 (1997); *Kollar v. United Transp. Union*, 83 F.3d 124 (5th Cir. 1996)(RLA preempted the plaintiffs' fraud claim because it could not be understood without reference to the collective bargaining agreement).

Hawaiian Airlines held that the RLA did not preempt an employee's claim based upon a right independent of the collective bargaining agreement. 512 U.S. at 260-263. Petitioner assumes that the FELA provides "substantive protection" against a railroad taking any adverse action against an employee under the terms of a collective bargaining agreement while an FELA suit is pending, that the FELA prohibits an employee's supervisors from communicating with him without his attorney's consent while a suit is pending, and that the FELA prohibits a railroad from exercising its rights under the collective bargaining agreement to require an employee to submit to a physical

examination to determine whether he is fit to return to duty. These assumptions are incorrect.

The FELA is not a federal labor law statute, but a statute which gives a railroad employee the right to sue for money damages if he is injured while at work. 45 U.S.C. § 51 *et seq.* Nothing in the FELA provides the "substantive protections" Petitioner claims here. The Supreme Court of Missouri also rejected Petitioner's claim that the Missouri Rules of Civil Procedure provided an "independent right" to be free from adverse employment actions while an FELA lawsuit was pending. Pet. App. 11a; 961 S.W.2d at 822-23.

The "substantive protections" which Petitioner has against adverse personnel actions, if any, are found in the collective bargaining agreement. As the Supreme Court of Missouri held, the issue of whether such protections exist and whether they were violated is, under the Railway Labor Act, a "minor dispute" because to answer such questions the court must interpret or apply the collective bargaining agreement. Pet. App. 12a-13a.; 961 S.W.2d at 821. Thus, the court below properly found that the trial court lacked jurisdiction to resolve these employment disputes. Pet. App. 15a-16a; 961 S.W.2d at 824.

Indeed, the premise underlying Petitioner's first question presented is faulty because the Missouri Supreme Court did not hold that the RLA preempts the trial court's ability to control discovery. Rather, it found that "the Rules of Civil Procedure control discovery in an FELA suit." Pet. App. at 11a; 961 S.W.2d at 822. The court also did not hold that the RLA preempts a trial court from any action regarding so-called "abusive tactics." The Missouri Supreme Court recognized that the trial court has certain powers to control "abusive tactics," specifically stating that "in the FELA case itself, the trial court remains authorized to employ its conventional trial court powers to control the parties and the litigation in the underlying FELA action." Pet. App. at 16a; 961 S.W.2d at 824.

The court below recognized that *Buell* held that the RLA did not preempt an FELA injury claim. Pet. App. at 9a; 961 S.W.2d at 821. Union Pacific has never asserted that the RLA preempts Petitioner's FELA personal injury claim, and the Missouri Supreme did not so hold. Petitioner's naked assertion that the Missouri Supreme Court's decision conflicts with *Buell* is untenable because nothing in its ruling prevented Petitioner from going forward with his FELA suit.

II.

Petitioner's second question presented poses the issue of whether a state trial court judge "has the power to enforce 45 U.S.C. § 55 to prevent an FELA Defendant from using the provisions of the collective bargaining agreement as part of a concerted plan to exempt itself from liability." Pet. at i. The Supreme Court of Missouri did not hold that the Railway Labor Act preempted § 55. It simply noted that the trial court did not find any violation of § 55.[4] The court below pointed out that the trial court "expressly rejected" the argument that allowing the railroad to discharge an employee under the terms of the collective bargaining agreement necessarily limited the amount of damages the employee could seek in an FELA lawsuit. Pet. App. at 25a & n.3; 14a-15a; 961 S.W.2d at 823.

The trial court disagreed with the notion, implicit in Petitioner's argument, that a discharge of the employee necessarily termi-

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[4] Petitioner's motion for a protective order and for sanctions did not even mention § 55, much less claim that he was entitled to relief because of that provision of the FELA. See Resp. App. at A-1 - A-3. For that reason, the trial court's order does not mention § 55 either. Pet. App. at 21a-28a. Petitioner did not comply with Rule 14(g)(i) of this Court in specifying the stage of proceedings at which the § 55 issue was first raised in both the trial and appellate court, so as to show that this issue was timely raised. As the text notes, Petitioner did not raise the § 55 issue until the proceeding in the Supreme Court of Missouri. This alone is sufficient reason to decline to review this question presented.

nates claims of future wage loss or that such action based upon his physical disability could be used to limit the railroad's liability, if any, under the FELA to the injured employee. Pet. App. 25a-26a & n.3. The Missouri Supreme Court concurred. Pet. App. 15a. Thus, Petitioner has the effect of the decision below on this point exactly backwards: Section 55 cannot be violated because neither the trial court nor the appellate court ruled that the actions taken or threatened to be taken in his case *ipso facto* "exempted" the railroad's liability to him. Accordingly, any issues regarding § 55 are not proper subjects for this Court's review. Thus, the only question presented for review is a state law question – whether Missouri law afforded him an independent right to the relief he requested.

III.

This Court "does not sit for the benefit of particular litigants," *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 40, 74 (1955), and limits its review to "cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Id.* at 79. Petitioner states, without further elaboration, that the Missouri Supreme Court's decision will have a "long-reaching impact important for all railroad workers in the United States." Pet. at 16. He does not explain how the decision below will affect "all" railroad workers, as opposed to the relative handful of workers who obtained "protective orders" in the Circuit Court of the City of St. Louis, supposedly grounded upon *state* court discovery rules, that prevent any adverse employment action against them while their FELA cases are pending.

As for Petitioner himself, he has a well-established remedy for challenging disciplinary action taken against him pursuant to the grievance and appeal procedures of the RLA. Petitioner has not even explained how the Missouri Supreme Court's opinion will affect his FELA personal injury action underlying the appellate

proceedings, especially in light of the Missouri Supreme Court finding that any disciplinary action against Harper would not deny him the right to maintain his FELA suit. Pet. App. at 16a; 961 S.W.2d at 824. His FELA suit is still pending and would not be affected by any decision of this Court. Moreover, and as the Missouri Supreme Court recognized, the RLA grievance and appeal procedures provide an effective (and exclusive) remedy for Harper to challenge the same conduct involved in the protective order at issue, so the Missouri Supreme Court's decision does not leave him without a remedy.

CONCLUSION

For the reasons stated above, the Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 962-07038

Division No. 1

JOHN E. HARPER,
Plaintiff,

vs.

MISSOURI PACIFIC RAILROAD COMPANY
and UNION PACIFIC RAILROAD COMPANY,
Defendants.

PLAINTIFF'S MOTION FOR PROTECTIVE ORDER AND FOR SANCTIONS

COMES NOW Plaintiff, John E. Harper, by and through his attorneys, and for his Motion for Protective Order and for Sanctions, states as follows:

1. Plaintiff respectfully asks this Court for an Order protecting him and prohibiting the Defendants from sending Plaintiff to a medical exam, a physical capacity evaluation or requiring him to provide medical documentation after rejecting a document from his treating physician advising him to stay off work and prohibiting Defendants from conducting an investigation and/or assessing discipline against Plaintiff for not attending such examinations or providing such documentation.

2. In support thereof, Plaintiff states that on April 17, 1996, he sustained injury as a result of having to remove a windshield from a locomotive engine without being afforded proper procedures, equipment or tools. After the accident, Plaintiff advised the Defendants of his injury and kept the Defendants fully apprised of his medical care as well as medications and addi-

tional restrictions imposed on him, by his treating physicians. (See Exhibit A [omitted from Resp. App.]) Plaintiff has had previous back injuries suffered through the course of his employment with the Defendants, and has been put on permanent restrictions by his physician as well as by his employer. Despite these restrictions, he has been called on to perform work which is beyond the scope of the restrictions imposed by his treating physicians in the course of his employment for the Defendants. Within one month of his injury, Plaintiff returned to seek the advice of the same treating physician who tendered medical care for his condition for a number of years; that physician recommended he remain off work for an undetermined amount of time. (See Exhibit B [omitted from Resp. App.]) The plaintiff presented Andrew Ribbing, a representative of his employer with this notice on May 14, 1996. Mr. Ribbing advised the plaintiff, in the presence of his union representative, that the note from his physician was insufficient; Mr. Ribbing then handed the Plaintiff a blank, undated form letter which requested specific information as to his medical care and condition. (see Exhibit C [omitted from Resp. App.]) Plaintiff advised Mr. Ribbing that he was scheduled for additional diagnostic testing on May 20, 1996, however did not yet have a specific date to return to the physician, pending the results of the tests. Mr. Ribbing indicated there was no particular hurry in providing the information requested. (See Plaintiff's affidavit [omitted from Resp. App.])

3. On June 1, 1996, the Plaintiff received a notice concerning an investigation which was scheduled for June 4, 1996 for his failure to comply with the instructions issued by Mr. Ribbing. (See Exhibit D [omitted from Resp. App.]) It is believed that the purpose of this investigation is to harass the plaintiff; the investigation invades the attorney-client privilege and such an investigation is used to conduct informal discovery which is beyond the scope of discovery permitted by the Missouri Rules of Civil Procedure.

4. After an extensive hearing, this Honorable Court considered similar factual issues in a number of similar Railroad cases which were filed in this Circuit with the intent of giving a precedent-setting Order in such cases. This Court, after careful consideration of evidence submitted by both sides, has ruled that such conduct by the Railroad is prohibited and shall be stayed until the end of the case. (See Exhibits E-1, E-2 and E-3 [omitted from Resp. App.])

That Plaintiff attaches hereto and incorporates herein, the documents and pleadings filed concerning these issues in *Duren v. Missouri Pacific Railroad, et al.,* Cause No.942-01584.

WHEREFORE, for the above reasons as well as the reasons stated in the filing of *Duren v. Missouri Pacific, et al.,* Plaintiff prays that the Court enter its Protective order Prohibiting Defendants from instructing Plaintiff to attend functional capacity tests, physical examinations or other similar tests and requiring him to provide medical documentation, and to further prohibit Defendants from disciplining Plaintiff for failing to attend such tests and examinations and for failure to provide medical documentation, or for insubordination for failing to comply with instructions and for other Sanctions as this Court deems appropriate.

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